Filed 11/6/12 P. v. Owen CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CHAD ERIC OWEN, Defendant and Appellant.	C067643 (Super. Ct. No. 09F07487)

A jury convicted defendant Chad Eric Owen of first degree burglary (Pen. Code, § 459)[1] and receiving stolen property (§ 496, subd. (a)). The trial court found that defendant had a prior serious felony conviction (§ 667, subds. (b)-(i); 1170.12) and three prior prison terms (§ 667.5, subd. (b)). In the interest of justice, the court dismissed one of the allegations of a prior prison term. The court sentenced defendant to 15 years in state prison.

On appeal, defendant contends the trial court erred by (1) refusing to instruct on the offense of being an accessory to a felony (§ 32), and (2) failing to find that defendant

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[1] Undesignated statutory references are to the Penal Code.

had an ability to pay the $702 cost of the presentence report prepared by the probation department.

We conclude that neither state nor federal law required the trial court to instruct on the lesser related offense of being an accessory to a felony. For lack of objection in the trial court, the issue of ability to pay has not been preserved for appeal, and the record provides no basis for concluding that defendant received ineffective assistance of counsel. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Prosecution Evidence

On October 6, 2009, Brian Clark saw a man lurking in front of the door to a residence on the corner of Tamarack Way and Romany Road in Sacramento. Clark also noticed a man sitting in a red truck that was parked across the street. The scene struck Clark as odd, and he continued to watch from his nearby office parking lot.

After a few minutes, Clark heard "a loud bang." The man who had been lurking outside the house was no longer visible. The driver of the truck (later identified as defendant) "appeared just to be looking around, looking." Clark walked toward the truck and attempted to write down its license plate number. Defendant saw Clark and "gestured" at him in a way that intimidated Clark. Clark walked away and called the police.

While awaiting the police, Clark saw the man who had previously been at the front door exit the house while carrying a large, flat-screen television. Defendant backed the truck into the driveway, and the man with the television placed it into the back of the truck. After returning into the house for a few minutes, the man got into the truck. Defendant then drove away.

Clark followed the truck in his own vehicle. The police soon pulled the truck over, and Clark identified the passengers as the individuals involved in the burglary. The police identified the driver as defendant and the passenger as Josh McCray.

The owner of the residence later identified as his the television in the back of the truck and a watch found in McCray's hand. The owner had not given defendant nor McCray permission to enter his house.

Defense Evidence

Defendant testified on his own behalf, stating that he had known McCray for 7 to 10 years. On October 6, 2009, McCray called defendant to ask him for a ride. At the time, defendant was living out of his truck.

McCray told defendant that he needed to pawn a television to pay the rent. McCray directed defendant to a house that he said was the home of the mother of his child. Defendant parked and waited for McCray to come back with the television. Defendant did not pay attention to where McCray went, nor did he hear a loud bang.

A few minutes later, defendant looked up and saw someone writing down his truck's license plate number. Defendant got out of his truck, dusted off his license plate, and made a gesture at the person writing down the plate number. When McCray called to him, defendant backed the truck into the driveway. McCray placed the television into the back of the truck and then got into the passenger seat. As defendant drove away, he told McCray about someone writing down the truck's license plate number. McCray then "melt[ed]" into his seat. Defendant suddenly realized that McCray had done something wrong. Just then, the police pulled defendant over.

Defendant testified that he did not know McCray intended to burglarize the house. Had he known of McCray's plan, defendant would have refused to participate.

Judgment and Sentencing

In addition to a sentence of 15 years in state prison, the trial court ordered defendant to pay various fines and fees. Among these was a $702 fee for the preparation of the presentence report. Neither defendant nor defense counsel objected to the imposition of any of the fines or fees.

DISCUSSION

I

Failure to Instruct on Being an Accessory to a Felony

Defendant contends the trial court violated his state and federal constitutional rights to trial by jury and due process of law by failing to instruct the jury on the offense of being an accessory to a felony as defined by section 32.[2] Defendant argues that the pinpoint instruction was required because his defense at trial was that his involvement in the burglary was limited to picking up McCray and driving him away with the stolen property. We reject the argument.

A.

Duty to Instruct on Lesser Related Offenses

As the California Supreme Court has explained, ""It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present (see, e.g., *People v. Hood* (1969) 1 Cal.3d 444), but not when there is no evidence that the offense was less than that charged. (*People v. Noah* (1971) 5 Cal.3d 469, 479; *People v. Osuna*

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[2] Section 32 provides: "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony."

(1969) 70 Cal.2d 759, 767.)'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 715-716.)

A lesser *included* offense is subsumed by the charged offense and as such is a "general principle of law" that requires proper instruction to the jury. (*People v. Birks* (1998) 19 Cal.4th 108, 117–118 (*Birks*).) By contrast, the trial court has no duty to instruct on an uncharged, lesser *related* offense. (*People v. Rundle* (2008) 43 Cal.4th 76, 147–148 (*Rundle*), overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *Birks*, at p. 136.) Neither the state nor federal Constitution requires that a trial court instruct on uncharged, lesser related offenses, even on request by the defense. (*Rundle*, *supra*, at pp. 147–148; *Birks*, at p. 124; *Hopkins v. Reeves* (1998) 524 U.S. 88, 96–97 [141 L.Ed.2d 76].)

B.

Being an Accessory to a Felony

In this case, defendant was not charged with being an accessory to a felony. Being an accessory to a felony is also not a lesser included offense to the charged offense of burglary. (See § 459 [providing that "[e]very person who enters any house . . . with intent to commit grand or petit larceny or any felony is guilty of burglary"]; *People v. Mouton* (1993) 15 Cal.App.4th 1313, 1322, disapproved of on another ground by *People v. Prettyman* (1996) 14 Cal.4th 248, 1324.) Thus, being an accessory to a felony was an uncharged, lesser related offense to the burglary charge for which defendant was tried. As an uncharged, lesser related offense, the trial court had no duty to instruct on section 32. (Cf. *Rundle*, *supra*, 43 Cal.4th at pp. 147–148.)

C.

Duty to Instruct on a Theory of the Defense

Defendant argues that the trial court was required to instruct on being an accessory to a felony on grounds that his defense at trial "was that the facts presented were more consistent with being an accessory than an aider and abettor."

By arguing that the trial court's failure to instruct on section 32 deprived him of his due process right to present a complete defense, defendant attempts to do indirectly what he cannot do directly, i.e., demand a jury instruction on an uncharged, lesser related offense. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1064–1065.) The California Supreme Court addressed a similar contention by holding: "An accessory instruction was not essential to defendant's defense. Through defendant's testimony and defense counsel's closing argument, the jury was fully apprised of the defense theories that it was [someone else] rather than defendant who [committed the charged offense]." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 213; see also *Birks, supra,* 19 Cal.4th at p. 136, fn. 19 ["nothing in our holding prevents the defendant from arguing in any case that the evidence does not support conviction of any charge properly before the jury, and that complete acquittal is therefore appropriate"].) As the record in this case shows, the defense was not prevented from arguing to the jury that his culpability was limited to being, at most, an accessory. Thus, the lack of an instruction on accessory to a felony did not deprive him of an adequate opportunity to present his claims.

Moreover, being accessory after the fact is a separate criminal offense rather than a defense to the charged crime of burglary. A defendant is liable for being an accessory when he or she "harbors, conceals or aids" a principal after a felony is complete. (§ 32.) Being an accessory to burglary is not a defense to principal liability for the commission of a burglary -— it is a discrete crime. (See *People v. Jennings* (2010) 50 Cal.4th 616, 668 ["[b]eing an accessory to murder is not a defense to aiding and abetting the commission of murder -— it is a separate criminal offense"]; see also *People v. Riley* (1993) 20 Cal.App.4th 1808, 1815 [holding that defendant was properly convicted as a principal and an accessory to the same murder based on separate acts of aid].) Because accessory liability is not a defense to principal liability, defendant was not entitled to instruction on section 32 as a defense to the charge of burglary. Accordingly, the trial court did not err in failing to instruct on being an accessory to a felony.

II

Order to Pay the Cost of the Presentence Report

Defendant contends the trial court erred in ordering him to pay the cost of the presentence report without first finding that he had an ability to pay. The Attorney General counters that defendant has forfeited the issue by not objecting first in the trial court. Anticipating forfeiture, defendant asserts that the lack of objection constituted ineffective assistance of legal counsel. We reject defendant's arguments.

A.

Forfeiture

This court has repeatedly held that a defendant's failure to object in the trial court to the imposition of a fee or fine forfeits the issue. (See, e.g., *People v. Crittle* (2007) 154 Cal.App.4th 368, 371; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468 (*Gibson*).) We have applied the forfeiture rule even when the claim on appeal is that there is insufficient evidence to support the imposition of the fine or fee. (*Gibson*, at pp. 1468–1469.) Here, defendant's failure to object to the imposition of an order to pay for the presentence report forfeits the issue on appeal.

Defendant argues that the issue should not be deemed forfeited. In support, he relies on *People v. Butler* (2003) 31 Cal.4th 1119, 1127 (*Butler*). *Butler* does not support defendant's argument. In *Butler*, our high court held that a defendant had not forfeited the issue of whether he was properly ordered to submit to HIV testing even though he did not first object in the trial court. (*Id.* at pp. 1123-1124.) The high court based its holding on the express mandate of section 1202.1. (*Ibid.*)

As pertinent to this case, *Butler* cautioned: "Our conclusion in this case is controlled not only by the specific terms of section 1202.1 but also by the general mandate that involuntary HIV testing is strictly limited by statute. For this reason, nothing in our analysis should be construed to undermine the forfeiture rule of *People v.*

Scott, supra, 9 Cal.4th 331, that absent timely objection sentencing determinations are not reviewable on appeal, subject to the narrow exception articulated in *People v. Smith* (2001) 24 Cal.4th 849." (*Butler, supra,* 31 Cal.4th at p. 1128, fn. 5.) Justice Baxter, joined by Justice Chin, concurred to "make explicit what is implicit in the majority opinion." (*Id.* at p. 1130.) Specifically, Justice Baxter noted that the forfeiture rule still applies to "claims that the record fails to demonstrate the defendant's ability to pay a fine." (*Ibid.*, citing *Gibson, supra,* 27 Cal.App.4th 1466.) Thus, we find that nothing in *Butler* requires us to depart from the rule in *Gibson* that a challenge to a fine based on inability to pay must be raised in the trial court in order to preserve the issue for appeal.

B.

Claim of Ineffective Assistance of Counsel

Anticipating our conclusion that he waived the issue for failure to object in the trial court, defendant asserts he received ineffective assistance of counsel because his attorney failed to object based on inability to pay. We reject the contention.

To establish ineffective assistance of counsel, defendant must show that (1) his counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's error, there is a reasonable probability that defendant would have obtained a more favorable result. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [80 L.Ed.2d 674, 693, 698]; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.)

Defendant cannot meet this burden because the record is silent as to why his trial counsel did not object and, based upon facts outside the record on appeal, counsel may have been aware that defendant had the ability to pay the $702 fee. In *People v. Mendoza Tello* (1997) 15 Cal.4th 264, the California Supreme Court held that a claim of ineffective assistance of counsel must be rejected if " ' "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." ' " (*Id.* at p. 266.) "A claim of ineffective assistance in such a

case is more appropriately decided in a habeas corpus proceeding." (*Id.* at pp. 266-267.) On this record, defendant's claim of ineffective assistance of counsel cannot be established.

DISPOSITION

The judgment is affirmed.

HOCH, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.